IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 87 OF 2000

1. Shri Gajanan Kandolker,
   major, married; and

2. Shri Suraj Gajanan
   Kandolker, about 22
   years old, unmarried.

   Both residing at
   Kholwada, Corlim,
   Tiswadi Taluka, Goa. ... Appellants

versus

State of Goa. ... Respondent

Mr. Mahesh Amonkar, Advocate for the Appellants.

Mrs. Winnie Coutinho, Additional Public Prosecutor for the State.

CORAM: P. V. HARDAS, J.

DATED: 7TH NOVEMBER, 2003.

ORAL JUDGMENT

The Appellants have challenged their conviction for an offence punishable under Sections 452, 326 and 324 of the Indian Penal Code r/w Section 34 of the Indian Penal Code and sentenced to undergo Rigorous Imprisonment for 3 years and fine of Rs.1000/-, in

default Simple Imprisonment for 15 days, Rigorous Imprisonment for 5 years and fine of Rs.5000/-, in default Simple Imprisonment for 3 months and Rigorous Imprisonment for 1 year and fine of Rs.1000/-, in default Simple Imprisonment for 15 days and fine of Rs.5000/- each for the offence under Section 323 of the Indian Penal Code, as recorded by the IInd Additional Sessions Judge, North Goa, Panaji, by Judgment dated 20th November, 2000, in Sessions Case No.41 of 1998.

2. Undisputedly, two first information reports came to be lodged in respect of the same incident and on the basis of the first information report at Exh.11 filed by P.W.3, Bhalchandra Kandolkar, the present Appellants and Original Accused No.2, Shalini came to be tried and convicted for the aforesaid offences by the learned IInd Additional Sessions Judge, North Goa, Panaji. In respect of the first information report lodged by Gajanan Kandolkar/Original Accused, an offence punishable under Section 323 r/w 34 came to be registered. Charge-sheet has also been filed in respect of the offence registered on the basis of the report of the Appellant/Original Accused No.1 and Criminal Case No.209/98/C is said to be pending on the file of the Judicial Magistrate First Class 'C' Court, Panaji. In the aforesaid case, P.W.3, Bhalchandra Kandolkar and others are arraigned as Accused in the said case. Undisputedly, both the first

information reports relate to the same incident and are different versions put forth by the Complainant herein and the Accused herein.

3. In view of the submission which is advanced by Mr. Mahesh Amonkar, learned Counsel appearing on behalf of the Appellants, I do not consider it necessary to advert to the various facts and other grounds which have been urged. Mr. Mahesh Amonkar, learned Counsel appearing on behalf of the Appellants has urged before me that the present case and the "counter case" or cross case" ought to have been tried and decided by the same Judge as it would obviate conflicting Judgments of two different Courts in respect of the same incident and it would also avert a possibility of scuttling one of the case at the very threshold.

4. In support of his submission, learned Counsel appearing on behalf of the Appellants has placed reliance in **Nathi Lal and others** v. **State of U.P. and others** reported in 1990(Supp) SCC 145. The Apex Court in the aforesaid authority has held as under:-

> "We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both the cross cases one after the other. After

> the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other".

5. Mr. Mahesh Amonkar, learned Counsel appearing on behalf of the Appellants has further placed reliance on another Judgment of the Supreme Court in **Sudhir and others** v. **State of Madhya Pradesh** reported in AIR 2001 SC 826. The facts of this authority are that two cases had been committed to the learned Sessions Court and the learned Sessions Court remitted one of the cases back to the learned Chief Judicial Magistrate as it found that the offence therein was not exclusively triable by the Court of Sessions. Since the cases were cross cases, the Supreme Court had held that the learned Sessions Court

therein was competent to try and dispose of the case though the offence therein was not exclusively triable by the Court of Sessions. The Apex Court has further held that under Section 323 of the Indian Penal Code, the Magistrate himself could commit the case to the Court of Sessions for trial according to law. The Supreme Court then further observed in paragraph 8 of the authority as under:-

> "8. It is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same Court by pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called "case and counter case" by some High Courts and "cross cases" by some other High Courts. Way back in nineteen hundred and twenties a Division Bench of the Madras High Court(Waller and Cornish, JJ) made a suggestion (In Re Goriparthi Krishtamma 1929 Mad WN 881) that "a case and counter case arising out of the same affair should always, if practicable, be tried by the same Court; and each party would represent themselves as having been the innocent victims of the aggression of the other."
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> 9. Close to its heels Jackson, J, made an exhortation to the then legislature to provide a mechanism as a statutory provision for trial of both cases by the same Court (vide Krishna Pannadi v. Emperor,

AIR 1930 Madras 190) : (1930 (31) Cri LJ 461). The learned Judge said thus:

"There is no clear law as regards the procedure in counter cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished."

10. We are unable to understand why the legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the Code. The practical reasons for adopting a procedure that such cross cases shall be tried by the same Court, can be summarised thus: (1) It staves off the danger of an accused being convicted before his whole case is before the Court. (2) It deters conflicting judgments being delivered upon similar facts and (3) In reality the case and the counter case are, to all intents and purposes, different or conflicting versions of one incident.

11. In fact, many High Courts have reiterated the need to follow the said practice as a necessary legal requirement for preventing conflicting decisions regarding one incident. This Court has given its approval to the said practice in Nathi Lal v. State of U.P. 1990 Supp SCC 145. The procedure to be followed in such a situation has been succintly delineated in the said decision and it can be extracted here:

"We think that the fair procedure to adopt in a matter

> like the present where there are cross cases, is to direct that the same learned Judge must try both cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other".

6. Undisputedly, counter cases or cross cases have to be tried and decided by the same Judge in order to avoid conflicting judgments in respect of the same set of facts. This rule of prudence is a rule of law in view of the two Judgments of the Supreme Court which are referred to above. The fact that a counter case is pending can be gathered from the testimony of P.W.11, Tukaram Malekar, Head Constable, who states "I had also referred A-1 Gajanan to G.M.C. Bambolim who had come to

the Police Station after P.W.3, Bhalchandra whom I had also referred to G.M.C.". He further states in the cross-examination " I had recorded complaint of A-1 Gajanan. I had filed charge-sheet under Sections 324, 323 and 504 r/w 34 I.P.C. acting on the complaint of A-1 Gajanan". This fact is also admitted by P.W.3, Bhalchandra Kandolkar, when he states "it is true that there is a criminal case filed against me, CW.3, Sumati, CW.9, Prashant and one Vasudev and the same is pending before the Judicial Magistrate First Class 'C' Court, Panaji.

7. In view of the two Judgments of the Supreme Court which have been referred to above by me, according to me, the present trial and the cross case ought to have been tried by the same Sessions Court and the procedure that ought to have been followed is the one enunciated in **Nathi Lal and others** v. **State of U.P. and another(supra).** In view of the matter, this Criminal Appeal will have to be allowed and the conviction of the Appellants will have to be set aside and the matter will have to be remitted back afresh for decision to the learned IInd Additional Sessions Judge, North Goa, Panaji, who shall after recording the evidence in the cross case decide both the cross case and this case independently by appreciating evidence tendered in each case.

8. Mr. Amonkar, learned Counsel appearing on behalf of the Appellants states that he shall file an application before the learned Sessions Judge, Panaji, for transferring the counter case pending before the Judicial Magistrate First Class 'C' Court, Panaji, to the file of the learned IInd Additional Sessions Judge, North Goa, Panaji, for trial and decision along with the present Criminal Appeal. In the event, however, such an application is not made, in view of the Judgments of the Apex Court in **Sudhir and others** v. **State of Madhya Pradesh** (supra), the learned Judicial Magistrate First Class 'C' Court, Panaji, exercising powers under Section 323 shall commit the case to the Court of Sessions for its decision along with the sessions trial No.41 of 1998.

9. In the aforesaid circumstances, this Criminal Appeal is allowed. The Judgment rendered by the IInd Additional Sessions Judge, North Goa, Panaji, dated 20th November, 2000, in Sessions Case No.41 of 1998 is hereby quashed and set aside and the matter is remitted back to the learned Sessions Court for deciding the sessions trial afresh along with Criminal Case No.209/98/C with the directions which are stated above.

10. The Appellants were on bail during their trial and during the pendency of this Appeal. Their bail shall

continue till the decision of this trial.

11. Criminal Appeal No.87 of 2000 is allowed accordingly on the aforesaid terms.

P. V. HARDAS, J.

RD.